UNITED STATES DEPARTMENT OF AGRICULTURE
FARM CREDIT ADMINISTRATION
WASHINGTON, D. C.

SUMMARY OF CASES RELATING TO FARMERS' COOPERATIVE ASSOCIATIONS

Prepared by

Lyman S. Hulbert

Liaison-Cooperative Attorney
Office of the Solicitor
Washington, D.C.

FOR THE

COOPERATIVE RESEARCH AND SERVICE DIVISION

Summary No. 28

December 1945

TABLE OF CONTENTS

Robinson-Patman Act

The Federal Trade Commission instituted proceedings against the Corn Products Refining Company and its subsidiary, the Corn Products Sales Company, charging that the basing point system used by these corporations in the pricing of glucose was in violation of the Robinson-Patman Act (49 Stat. 1526, 15 U.S.C. 13). Section 2(a) of this Act reads in part as follows:

> "(a) . . . it shall be unlawful for any person engaged in commerce . . . either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: . . ."

Under this basing point system of pricing, all sales of glucose were made at delivered prices "computed by adding to a base price at Chicago the published freight tariff from Chicago to the several points of delivery, even though deliveries are in fact made from their factory at Kansas City as well as from their Chicago factory."

In brief, although a shipment of glucose might be made from the factory of the defendants located in Kansas City to a point in, for instance, Missouri, the purchaser would be required to pay, in addition to the purchase price and as a part thereof, an amount equal to the freight on a comparable shipment of glucose sent from Chicago. In other words, all purchasers of glucose paid a flat price and in addition an amount equal to the freight on the purchase from Chicago to the point of delivery even though the shipment might be made from the factory of the defendants in Kansas City. Purchases of glucose might be made from the factory in Chicago and delivery accepted there, and thus the purchasers would be relieved from the payment of any freight charges on the purchases. In some instances the freight from Kansas City on a shipment to the point of delivery would exceed the amount of freight on a comparable shipment that might be made from Chicago. In instances of this kind the defendants "absorbed" the difference. In many cases, however, it appeared that on shipments made from Kansas City the delivered price included "unearned or 'phantom' freight, to the extent of the difference in freight rates."

The Federal Trade Commission issued a cease and desist order against the defendants, who appealed the case to the Circuit Court of Appeals for the Seventh Circuit, which sustained the order issued by the Commission. The defendants then appealed the case to the Supreme Court of the United States.

(Corn Products Refining Company, and Corn Products Sales Company, Petitioners, vs. Federal Trade Commission, 65 S. Ct. 961).

The Supreme Court, in upholding the order issued by the Federal Trade Commission, pointed out that "The price discriminations resulting from this systematic inclusion of the freight differential in computing the delivered price are not specifically permitted by the statute." The proviso in the statutory provision quoted above permits price differentials "which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered."

Obviously, as the Supreme Court said, the statute does not authorize a difference in prices based upon a basing point system such as that used by the defendants. The defendants argued that there is an implicit exception to the statute authorizing such a basing point system. They urged that there was no discrimination under their basing point system between buyers at the same point of delivery and they urged that the prohibition in Section 2(a) was directed only at price discriminations between buyers at the same delivery points. The Supreme Court, however, rejected this argument and stated that there was nothing in the statute to justify this position. The court said that the purpose of the statute was "to prevent injuries to competition through price discriminations." It appeared that -

> "The purchasers of glucose from petitioners are found to be in competition with each other, even though they are in different localities. The injury to the competition of purchasers in different localities is no less harmful than if they were in the same city."

The basis for the decision of the Supreme Court is disclosed in the following quotations from its opinion:

> "Since petitioners' basing point system results in a Chicago delivered price which is always lower than any other, including that at Kansas City, a natural effect of the system is the creation of a favored price zone for the purchasers of glucose in Chicago and vicinity, which does not extend to other points of manufacture and shipment of glucose. Since the cost of glucose, a principal ingredient of low-priced candy, is less at Chicago, candy manufacturers there are in a better position to compete for business, and manufacturers of candy located near other factories producing glucose, distant from the basing point, as Kansas City, are in a less favorable position. The consequence is, as found by the Commission, that several manufacturers of candy, who were formerly located in Kansas City or other cities served from petitioners' Kansas City plant, have moved their factories to Chicago. .

> "Further, we have seen that prices in cities to which shipments are made from Kansas City, are frequently discriminatory, since the prices in such cities usually vary according to factors, phantom

freight or freight absorption, which are unrelated to any proper element of actual cost. And these systematic differentials are frequently appreciable in amount. The Commission's findings that glucose is a principal ingredient of low priced candy and that differences of small fractions of a cent in the sales price of such candy are enough to divert business from one manufacturer to another, readily admit of the Commission's inference that there is a reasonable probability that the effect of the discriminations may be substantially to lessen competition.

"The weight to be attributed to the facts proven or stipulated, and the inferences to be drawn from them, are for the Commission to determine, not the courts. See Federal Trade Commission v. Pacific States Paper Trade Assn., 273 U.S. 52, 63; Federal Trade Commission v. Algoma Lumber Co., 291 U.S. 67, 73; cf. Labor Board v. Southern Bell Tel. Co., 319 U.S. 50, 60. We cannot say that the Commission's inference here is not supported by the stipulated facts, or that it does not support the Commission's order."

Another practice of the defendants which was condemned by the order of the Federal Trade Commission and which was upheld by the Supreme Court involved the practice followed by the defendants of permitting customers periods of time after a change in prices had been announced during which periods these customers could purchase glucose at the old prices and accept delivery thereof. It appeared that the normal practice was for the defendants to allow customers a period of thirty days in which they might take delivery of the glucose purchased. It appeared that favored customers were permitted to purchase glucose during periods of time not permitted to other customers and to take delivery during periods of time not permitted to other customers. The defendants claimed that Section 2(a) only prohibited discriminations in prices and did not involve the terms and conditions of sale other than price. The Supreme Court countered by saying that even if this contention is correct, that "we cannot ignore the fact that the present discriminations in the terms of sale operated to permit the favored customers to purchase at a lower price than other customers, so that their only practical effect was to establish discriminations in price, precisely the evil at which the statute was aimed."

It appeared also that the defendants had allowed certain purchasers of its by-products discounts which it had not given to other purchasers. It was not contended that these discriminations were authorized by the statute, but it was claimed that they had no effect on competition. In this connection the Supreme Court said:

"As we have said, the statute does not require that the discriminations must in fact have harmed competition, but only that there is a reasonable possibility that they 'may' have such an effect. We think that it was permissible for the Commission to infer that these discriminatory allowances were a substantial threat to competition."

It appeared also that the defendants had given the Curtiss Candy Company an allowance of $750,000 which was used for advertising Curtiss candy as being "rich in dextrose," while other purchasers of glucose were not given any advertising allowances. This was found to be in violation of 15 U.S.C. 13(e) which reads as follows:

> "(e) It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms."

It was claimed by the defendants that this advertising allowance was not made in connection with a sale. The Supreme Court, however, found, as did the Federal Trade Commission, that there was a connection between the purchases of glucose from the defendants and the advertising allowance.

Under the Robinson-Patman Act under normal conditions a seller that is subject to the terms of that Act is free to choose his own customers (Sorrentino v. Glen-Gery Shale Brick Corporation, 46 F. Supp. 709). This means, of course, that he may sell to one and refuse to sell to another. Indeed the statute (15 U.S.C. 13(a)) provides "That nothing contained in sections 12, 13, 14-21, 22-27 of this title shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade." On the other hand if a seller elects to sell to a given concern and the sale is subject to the Act it contemplates that he will sell to this concern at as favorable a price as he is then selling to others, unless the differences in price may be justified by "differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered."

There appears to be nothing in the Robinson-Patman Act which bars sellers from selling to concerns that have united in a common purchasing agency for the making of purchases, but any differences in price which are permitted to such purchasing agencies must be justified by the proviso to the statutory provision which proceeds on the theory that normally all buyers under similar conditions will be entitled to the same prices. In other words a seller may allow any discounts that accounting would show were justified by the savings effected.

The necessity of justifying discounts or discrimination in prices which are given or obtained by a buying agency (or by anyone else) is illustrated by the case of Federal Trade Commission v. Associated Merchandising Corporation, et al., decided by the Federal Trade Commission on May 8, 1945, Docket No. 5027, in which it appeared that the Associated Merchandising Corporation "was created, and is now being maintained and operated, by respondent members as an instrument, method, agency, and means whereby said respondent members are enabled to act collectively to obtain special

allowances and discounts on their purchases of goods, wares, and merchandise for resale in their respective stores." In view of the fact that the special allowances and discounts given by sellers of goods to the Associated Merchandising Corporation were not justified by the proviso to the statutory prohibition forbidding discrimination in prices, a cease and desist order was issued by the Federal Trade Commission against the respondents.

As further illustrating that discounts or allowances must be authorized by the terms of said proviso, attention is called to the case of Federal Trade Commission v. John B. Stetson Company, decided by the Federal Trade Commission on October 8, 1945, Docket No. 5172, in which it appeared that the John B. Stetson Company granted discounts to buyers of its hats based on the annual purchases of such hats, the amount of the purchases of hats being ascertained at the end of a given period and the discounts being based on the total amount of hats which were purchased during the period. The Federal Trade Commission issued a cease and desist order barring the practice of giving cumulative discounts. Obviously the cease and desist order proceeded on the theory that the discounts or allowances given were not authorized by the terms of the proviso.

Under the statute it appears that differences in prices may be permitted to purchasers if such differences may not have any effect upon competition (A. E. Staley Mfg. Co. v. Federal Trade Commission, 135 F. 2d 453), but in view of the fact that widely separated concerns are frequently in active competition with each other it would appear to be an unusual case in which a price differential could be justified solely on the ground that it had no effect upon competition.

In brief, like prices are the rule in transactions under the Robinson-Patman Act; and differences must be justified by the specific terms of the statute.

It will be remembered that the Robinson-Patman Act is as applicable to cooperative associations as it is to other types of business concerns. There is no exception in favor of cooperative associations. It is true that the Robinson-Patman Act assures cooperative associations of the right to pay patronage dividends, but this, of course, relates only to how their savings may be distributed and it does not in any way authorize cooperative associations to receive discounts or allowances in transactions covered by the Robinson-Patman Act except in accordance with that statute. See Quality Bakers of America v. Federal Trade Commission, 114 F. 2d 393.

It is helpful to an understanding of the Robinson-Patman Act if it is kept in mind that one of its purposes is to enable relatively small buyers to be able to purchase goods on a basis approximating that on which large buyers may obtain them. It has been said that an object of the Robinson-Patman Act was to eliminate advantages arising from what has been referred to as "coercive buying power." See 34 Illinois Law Review 319.

A concern that is engaged in the selling of supplies to purchasing associations may give them such discounts as may be justified by accounting, but such discounts it appears would have to be justified by the proviso that "nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered." There appears to be no other basis for justifying discounts from the current prices charged by a seller.

Of course there can be no price discrimination and hence no violation of the provisions of the Robinson-Patman Act forbidding price discrimination if a buyer is buying all of the particular goods or supplies that a concern is engaged in selling, or all of a particular article, and in cases of this character the parties are free to agree upon such prices as may be mutually acceptable.

The provisions of the Robinson-Patman Act prohibiting discrimination in price are entirely distinct and apart from the provisions of the Robinson-Patman Act forbidding a buyer or seller to pay brokerage or its equivalent to the other party or his agent. Section 2(c) of the Robinson-Patman Act, 15 U.S.C. Sec. 13(c), is the brokerage section of that act and reads as follows:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid."

In the recent case of <u>Southgate Brokerage Co. v. Federal Trade Commission</u>, 150 F. 2d 607, the court passed upon the validity of an order issued by the Federal Trade Commission to "cease and desist from accepting brokerage on purchases made for the Company's own account." The Southgate Brokerage Company was in part engaged in the buying of goods to which it took title and over which it had complete jurisdiction, and in connection with which it received so-called brokerage from the sellers of the goods. The court, in upholding the order of the Commission, referred to the brokerage section of the Robinson-Patman Act quoted above and said:

> "It is perfectly clear that this provision forbids the payment of brokerage on a sale or purchase of goods to the other party to the transaction. The seller may not pay the buyer brokerage on the latter's purchases for his own account. As said in the Report of the House and Senate Conference Committee with reference to this

subjection (House Rep. 2951, 74th Cong. 2nd Sess.): 'This subsection permits the payment of compensation by a seller to his broker or agent for services in connection with the purchase of goods actually rendered in his behalf; but it prohibits the direct or indirect payment of brokerage except for such services rendered. It prohibits its allowance by the buyer direct to the seller, or by the seller direct to the buyer; and it prohibits its payment by either to an agent or intermediary acting in fact for or in behalf, or subject to the direct or indirect control, of the other.'

"The section has been so construed in all of the cases in which it has been considered. Biddle Purchasing Co. v. Federal Trade Commission, 2 Cir., 96 F. 2d 687; Oliver Bros. v. Federal Trade Commission, 4 Cir. 102 F. 2d 763; Great Atlantic & Pacific Tea Co. v. Federal Trade Commission, 3 Cir. 106 F. 2d 667; Webb Crawford Co. v. Federal Trade Commission, 5 Cir. 109 F. 2d 268; Quality Bakers of America v. Federal Trade Commission, 1 Cir. 114 F. 2d 393; Jarrett v. Pittsburgh Plate Glass Co. 5 Cir. 131 F. 2d 674; Fitch v. Kentucky-Tennessee Light & Power Co. 6 Cir. 136 F. 2d 12, 149 A.L.R. 650 and note at page 662 et seq. and cases there cited; Modern Marketing v. Federal Trade Com. 7 Cir., 149 F. 2d 970. As said in Quality Bakers of America v. Federal Trade Commission, supra, 114 F. 2d 393 at page 398: 'It is plain enough that the paragraph, taken as a whole, is framed to prohibit the payment of brokerage in any guise by one party to the other or the other's agent, at the same time expressly recognizing and saving the right of either party to pay his own agent for services rendered in connection with the sale or purchase.'

"It is argued that the section is not applicable here because the receipt by the company of brokerage from the sellers results in no discrimination against buyers, since the company sells only to wholesalers, who pay the prices that they would otherwise pay if the sales were made to them through brokers. It is said that a distributor, such as the company, renders to the wholesale trade the service that a broker ordinarily performs, and that no discrimination is involved in allowing such distributor the ordinary broker's commissions. The answer is that price discrimination, which is covered by section 2(a) of the Act, 15 U.S.C.A. § 13(a), is not necessary to a violation of section 2(c), quoted above, which specifically forbids the payment of brokerage by the seller to the buyer or the buyer's agent."

It was argued on behalf of the appellants that they were engaged in doing things that were helpful to the sellers and hence that the sellers of goods were entitled to pay them for doing this work. In disposing of this argument the court said in part:

"For sellers to pay purchasers for purchasing, warehousing or reselling the goods purchased is to pay them for doing their own work, and is a mere gratuity. Cf. Mitchell Coal & Coke Co. v. P. R. R. Co. 230 U.S. 247, 263, 33 S. Ct. 916, 57 L. Ed. 1472;

Merchants Warehouse Co. v. United States 283 U. S. 501, 511, 51 S. Ct. 505, 75 L. Ed. 1227."

There appears to be no way by which a seller may pay a brokerage to a buyer or to his agent, or under which a purchaser may pay a brokerage to a seller or his agent without violating the brokerage section quoted above of the Robinson-Patman Act.

In the case of Federal Trade Commission v. Herzog, 150 F. 2d 450, in which the Federal Trade Commission petitioned the circuit court of appeals for the second circuit to enter a decree commanding obedience to a cease and desist order which it had issued, the court said in part:

> "On this record it stands admitted that the respondents received from sellers commissions on transactions in which they 'act as agents for the purchase of fur garments for and on behalf of' retailers, whose orders they place at 'the most advantageous price from the standpoint of the buyer', and 'in whose behalf said respondents have been and are, in fact, acting', while other competitive retailers 'undergo buying expense by maintaining buying offices, retain the services of fur garment buyers known as "fee" buyers, or send representatives to New York City to make fur garment purchases.' This results in a price discrimination in favor of the retailers who do business with the respondents, and is contrary to the purpose and the language of the statute, 15 U.S.C.A. § 13(c), which prohibits the payment of compensation by one party to the other, or to the other's agent, although preserving the right of either party to pay his own agent for services rendered in connection with the sale or purchase."

As shown in the foregoing quotation, the respondents, while acting on behalf of buyers who did not pay the respondents anything for acting for them, received commissions from sellers which were held to be in violation of the brokerage section of Robinson-Patman Act.

A point that is frequently overlooked is the fact that while the Federal Trade Commission is authorized only to issue a cease and desist order against a concern that it finds has violated the Robinson-Patman Act, such a violation may result in a suit for treble damages under the antitrust statutes. The Robinson-Patman Act is an amendment to the Clayton Act, one of the antitrust statutes, and hence is a part of our antitrust laws.

Section 4 of the Clayton Act, 15 U.S.C. 15, provides that -

> "Any person who shall be injured in his business or property by reason of any thing forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Under the foregoing provision, in the case of Fitch v. Kentucky-Tennessee Light and Power Company, 136 F. 2d 12, 149 A.L.R. 650, the light and power company brought suit for treble damages under the Robinson-Patman Act against its former president, a coal company and its president, because the former president of the light and power company had received and retained "commercial bribes" of 15 cents on each ton of coal which he had purchased on behalf of the light and power company from the coal concern and its president. In consideration of a covenant not to sue, the coal company and its president paid to the light and power company the sum of $75,000 and the suit was then continued against the former president of the light and power company. The case was referred to a special master to fix the damages in accordance with the statute and it was found that the light and power company had been damaged in the amount of $58,788.01. This amount was trebled and judgment for this sum was then entered against Fitch, which was subsequently credited with the amount of $75,000 previously paid by the coal company and its president. On appeal, the judgment of the district court was affirmed.

The risk which any concern incurs by violating the Robinson-Patman Act may be serious in view of the fact that it may be liable for treble damages under the above quoted provision of the Clayton Act.

In the annotation in A.L.R. to the case last cited the author says:

> "A violation of subsection (c) of §2 of the Clayton Act, as amended by the Robinson-Patman Act, may produce one or several of the following consequences: (1) a cease and desist order may issue from a Federal administrative agency; (2) a suit for an injunction may be brought by the United States Attorney General or by a private individual; (3) an injured party may sue in a Federal court for treble damages; (4) if there is a contractual promise to pay, it is illegal and void."

* * * * *

Exemption - Federal Motor Carrier Act

The Interstate Commerce Commission brought a suit to enjoin the Jamestown Farmers Union Federal Cooperative Transportation Association, a corporation, from engaging in the business of transportation because it had not obtained a certificate of public convenience and necessity from that Commission. The Federal District Court held against the Commission and its opinion appears in 57 F. Supp. 749 (see Summary No. 25 at page 20). The Interstate Commerce Commission then appealed to the Circuit Court of Appeals for the Eighth Circuit and the opinion of that court given on October 23, 1945, No. 13,051, affirming the judgment of the Federal District Court, follows:

> "Before WOODROUGH, JOHNSEN, AND RIDDICK, Circuit Judges.
>
> "RIDDICK, Circuit Judge, delivered the opinion of the court.

"The Interstate Commerce Commission brought this action to enjoin the Jamestown Farmers Union Federated Cooperative Transportation Association from alleged violations of sections 206(a) and 209(a) of Part II of the Interstate Commerce Act, 49 U.S.C.A., Secs. 306(a) and 309(a). These sections of the Act provide that no common or contract carrier by motor vehicle, subject to the provisions of the Act, shall engage in interstate operation unless there is in force, in respect to such carrier, a certificate of public convenience and necessity issued by the Commission. The District Court sustained the appellee's claim of exemption under section 203 of the Act, 49 U.S.C.A., Sec. 303(b), which, so far as material here, provides that:

'Nothing in this chapter * * * shall be construed to include * * * (5) motor vehicles controlled and operated by a cooperative association as defined in the Agricultural Marketing Act of 1929, as amended (12 U.S.C.A., Secs. 1141-1141j), or by a federation of such cooperative associations if such federation possesses no greater powers or purposes than cooperative associations so defined * * * .'

"The facts are stipulated. The Jamestown Farmers Union Federated Cooperative Transportation Association, hereinafter called the appellee, is a federation of cooperative associations, incorporated under North Dakota law. It possesses no greater powers or purposes than those possessed by each of its member cooperative associations, which themselves, farmer controlled and farmer operated, perform the functions and observe the restrictions set forth in section 15 of the Agricultural Marketing Act of 1929, as amended, 12 U.S.C.A., Sec. 1141j. Appellee is engaged exclusively in the business of transportation for compensation by motor vehicle on public highways between points in North Dakota and Minneapolis, St. Paul, and South St. Paul in Minnesota.

"The appellee's eastbound traffic consists exclusively of livestock, all of which is delivered to appellee by one of its member cooperative associations, and all of which is destined to St. Paul Stockyards at South St. Paul, Minnesota. The appellee issues to the member cooperative association from which it receives livestock a receipt showing the name of the person to whom it is to be delivered and the charge for transportation. The name of the person who delivered the livestock to the member association does not appear on this receipt, and appellee has no dealings with such person.

"Appellee's westbound traffic consists exclusively of merchandise delivered to it by the Farmers Union Central Exchange of South St. Paul, Minnesota, a federated cooperative association and a member and stockholder of appellee. This merchandise is destined to various member associations of appellee in cities and towns in North Dakota for resale by them without restriction of sales to farmers. Non-farmers purchase from three to fourteen per cent of

this merchandise. The appellee issues to the Farmers Union Central Exchange a receipt for the merchandise received from it for transportation to the consignee named therein, which is always one of appellee's member associations.

"Except in occasional instances, the appellee renders no transportation service which includes receipt of property at a farm or from a farmer, nor does it make delivery of any property transported by it at a farm or to a farmer. None of appellee's member cooperatives owns or operates a farm.

"The issue on this appeal is the scope of the exemption created by section 203(b) of the Interstate Commerce Act, quoted above. The Commission contends that appellee is not entitled to the claimed exemption because, in its opinion, the transportation, which is the exclusive business of appellee, is not included in the authorized activities of cooperative associations as such associations are defined by the Agricultural Marketing Act unless performed as a direct farm business service; that the transportation in which appellee is engaged is not a farm business, since it does not connect either at origin or destination with a farm; that the transportation of merchandise to be offered for sale without restriction of sales to farmers is not a farm business service nor an authorized activity of a cooperative association; and that these conclusions are required by a strict construction of the exemption relied upon by appellee.

"We can not agree with these contentions of the Commission. As was pointed out by the District Court, we are confronted at the very threshold of this case with an evident recognition on the part of Congress that both cooperative associations of farmers and federations of such cooperative associations, operating within the limits imposed by the Agricultural Marketing Act, may rightfully engage in transportation interstate by motor vehicles. Otherwise, as the District Court pointed out, the exemption contained in the Interstate Commerce Act with reference to trucks used in such transportation by cooperatives and federations of cooperatives is meaningless. This being true, it follows, under the stipulation, that appellee possesses no greater powers or purposes than its member cooperative associations, that it is exempt from the proposed regulation by the Commission, unless the transportation in which it is engaged is not an operation in which a farm cooperative may engage.

"It is, of course, true that the exemption relied on by the appellee must be strictly construed when the necessity for construction arises. So construed, it may well be true, as the Commission contends, that a truck operated in interstate commerce by a farmers cooperative for a purpose not within the contemplation of Congress in the Agricultural Marketing Act is not exempt from the requirement of a certificate of public necessity and convenience. But whether the interstate operation of such a truck is in an activity in which the farmers cooperative is or is not permitted to engage presents a question arising under the Agricultural Marketing Act, a

remedial statute, entitled to a liberal construction to effectuate the purpose for which it was adopted. It is this Act which requires construction here.

"The expressed purpose of the Agricultural Marketing Act (12 U.S.C.A., Sec. 1141) is:

> '* * * to promote the effective merchandising of agricultural commodities in interstate and foreign commerce, so that the industry of agriculture will be placed on a basis of economic equality with other industries, and to that end to protect, control, and stabilize the currents of interstate and foreign commerce in the marketing of agricultural commodities and their food products -
>
> * * * * *
>
> '(2) by preventing inefficient and wasteful methods of distribution.
>
> '(3) by encouraging the organization of producers into effective associations or corporations under their own control for greater unity of effort in marketing and by promoting the establishment and financing of a farm marketing system of producer-owned and producer-controlled cooperative associations and other agencies.
>
> '(4) by aiding in preventing and controlling surpluses in any agricultural commodity, through orderly production and distribution, so as to maintain advantageous domestic markets and prevent such surpluses from causing undue and excessive fluctuations or depressions in prices for the commodity.'

A cooperative association is defined (12 U.S.C.A., Sec. 1141j) as any association in which farmers act together in processing, preparing for market, handling, and marketing the farm products of persons so engaged; and any association in which farmers act together in purchasing, testing, grading, processing, distributing, and furnishing farm supplies or farm business services. A cooperative association as defined must be operated for the mutual benefit of its members as producers or purchasers, and 'shall not deal in farm products, farm supplies, and farm business services with or for nonmembers in an amount greater in value than the total amount of such business transacted by it with or for members.'

"That the economical and efficient transportation of farm products to market and of farm supplies to farmers is a necessary farm business service can not be doubted. To require that such transportation must originate or end in every case at a farm is to deny to the farmer one of the farm services which the Agricultural Marketing Act was intended to make available to him through the operation of farmer cooperatives. Nothing in the Act either

expressly or by implication justifies a holding that the farmer cooperatives may not transport to market farm products which its member farmers have transported and delivered to the cooperative; nor that the trucks of the cooperatives used in such transportation may not on return trips transport farm supplies for delivery to the cooperatives for resale. And since a cooperative association is expressly permitted by the Agricultural Marketing Act to transport farm supplies and to render farm service to or for others than its members, the fact that some of the farm supplies carried in its westbound traffic may be sold to others than farmers is of no significance, so long as the proportion of such sales and services is not greater than that permitted by the Act. If, as we hold, a single farm cooperative association may engage in the transportation of farm products from itself to market and of farm supplies and merchandise from the market to itself for resale, it can not be doubted that a federation of such associations may engage in the same transportation. In so doing, it is exercising no greater power than any of its member cooperatives may exercise. It is reasonable to suppose that the reason for the organization of a federation of cooperatives to perform the character of transportation under consideration is that the federation of many cooperatives is able to perform this authorized farm business service more efficiently and economically than could its individual member associations. To the extent that the federation is able to realize the purpose for which it is organized, it is an effective instrumentality in the promotion of the purposes which the Agricultural Marketing Act was designed to realize. To say that such a federation of farmer-owned and farmer-controlled cooperative associations is not itself a farmer-owned and farmer-controlled instrumentality is to give to the Agricultural Marketing Act a narrow and strict construction which its character and purpose forbids.

"The judgment of the District Court is affirmed."

As will be observed from a reading of the foregoing opinion, the Circuit Court of Appeals as well as the Federal District Court, held that a federated cooperative association, in order to be eligible for the limited exemption provided for in the Federal Motor Carrier Act, was not required to haul commodities from farms to market and from a market to farms but could haul from the local stores of its cooperative members to market and from market to such local stores.

* * * * *

Fixtures

In the case of Pritchard Petroleum Co. v. Farmers Co-op. Oil & Supply Co. of Conrad, et. al., decided by the Supreme Court of Montana, 161 P. 2d 526, it appeared that the cooperative association had placed two large horizontal storage tanks used in its business "of selling at retail gasoline,

distillate, oil and greases," on land which it thought it owned. This was done in November 1935. In 1942 as a result of a suit brought by the Pritchard Petroleum Company to quiet the title to the land on which the horizontal tanks were located, title to the land was held to be in the Pritchard Petroleum Company. The court said:

> ". . . there was no agreement between the Farmers Co-operative Oil and Supply Company and the Pritchard Petroleum Company that the Farmers Co-operative Oil and Supply Company could remove the tanks affixed to the realty of the Pritchard Company, and the Pritchard Petroleum Company did not choose to require the Farmers Co-operative Oil and Supply Company to remove its tanks.
>
> "The possession of said tract of land by the Farmers Co-operative Oil and Supply Company for a period of five years following April, 1935, did not create the relation of landlord and tenant and consequently the Farmers Co-operative Oil and Supply Company is not aided by Section 6825, Revised Codes."

Under the circumstances it was held that the horizontal tanks were a part of the realty and that as there was no agreement that the Farmers Co-operative Oil and Supply Company could remove the tanks, which the court found had become a part of the realty, title to the tanks passed to the Pritchard Petroleum Company as a part of the land on which they were located.

In regard to the effect of agreements on fixtures and the effect of such agreements on third persons, attention is called to Sections 17 and 18 of 22 Am.Jur., under the heading of "Fixtures," which sections read as follows:

> "§ 17. Generally. - It is a general rule that where an article belonging to one person is annexed to the freehold of another, it is competent for them to agree that, as between themselves, such article shall remain personalty and be removable at the pleasure of its owner. This rule is subject to the qualification that where the article annexed to the freehold loses entirely the character of personal property, or where it is so firmly affixed as to become thoroughly and substantially a part of the realty, its character as personalty will not be preserved, even by a special agreement intended to accomplish that result. On the other hand, it has been said that as between the vendor and vendee of personalty, it may by agreement be made to retain its personal character, even though affixed to the realty in such manner that it cannot be removed without injury to the realty. The rule permitting agreements to vary the law as between the parties themselves obtains particularly where the agreement is entered into before annexation of the chattel. It has even been held that after annexation, the owner may, by agreement, reimpress the character of personalty upon chattels which, by annexation, have become fixtures. There is authority, however, for the position that such an agreement does not become operative until after severance. Such an agreement may be implied from circumstances or from

the fact that the property is sold under a conditional sale contract or chattel mortgage. Under such an agreement, the property may be sold on execution against the owner as personal property; and it is the subject of sale or mortgage as personal property.

"The application of the foregoing rules in the case of agreements between particular persons or with respect to particular subjects is considered in subsequent sections.

"§ 18. <u>Effect as to Third Persons</u>. - As pointed out above, an agreement to preserve the original character of a fixture as a chattel, or to reimpress it therewith, is binding only on the parties and their privies. Thus, a lessor is not bound by such an agreement between the lessee and the seller of the fixtures, where the lease does not authorize their removal, and they cannot be severed without injury to them or to the freehold. Nor is such an agreement effective against an express stipulation to the contrary in a prior mortgage of the realty. Furthermore, in some jurisdictions, it is held that notwithstanding such an agreement, fixtures annexed subsequent to a mortgage on the realty become subject to the mortgage as being part of the realty. Such an agreement, moreover, cannot operate against the rights of third persons subsequently acquired without notice. Accordingly, it is generally held that it cannot affect the rights of subsequent mortgagees or purchasers without notice, although there are some authorities to the contrary. Conversely, a purchaser or subsequent mortgagee of land with notice of an agreement that an article attached to the realty shall remain personal property takes, subject to such agreement, and cannot claim the article annexed."

* * * * *

<u>State Advertising of Its Agricultural Commodities</u>

In the case of <u>Louisiana State Department of Agriculture</u> v. <u>Sibille</u>, the Supreme Court of Louisiana, 22 So. 2d 202, passed upon the constitutionality of a statute of that State enacted in 1942 which levied a tax on shippers of sweet potatoes for the purpose of collecting money to be used by the Louisiana Sweet Potato Advertising Agency, a State organization established for the purpose of advertising sweet potatoes.

The statute was held unconstitutional insofar as it levied and imposed a tax on farmers or the growers of sweet potatoes, because it was deemed to violate a provision of the constitution of Louisiana reading in part as follows:

"License taxes may be levied on such classes of persons, associations of persons and corporations pursuing any trade, business, occupation, vocation or profession, as the Legislature may deem proper, except * * * those engaged in * * * agricultural * * * pursuits * * *."

In brief, it was held that the tax was in the nature of a license tax on those engaged in agricultural pursuits.

On the other hand the statute was upheld in regard to other shippers of sweet potatoes. The court specifically held that the purpose of the tax was a public one inasmuch as it was enacted for the purpose of collecting a fund to advertise Louisiana sweet potatoes and thus increase the consumption and production of them. In upholding the constitutionality of the tax statute except as to farmers the court relied upon cases involving similar statutes that had been upheld in other States. In this connection the court said:

> "In three other states of the union statutes imposing a tax of a similar nature have been enacted and judicially considered. In Floyd Fruit Company v. Florida Citrus Commission, 128 Fla. 565, 175 So. 248, 112 A.L.R. 562, the statute assailed as being unconstitutional levied an advertising tax of a designated amount on each standard-packed box of citrus fruit grown in the State of Florida and provided that it should be due and payable and paid when the fruit is first handled in the primary channels of trade. The case of State ex rel. Graham v. Enking, 59 Idaho 321, 82 P. 2d 649, involved a like statute affecting fruits and vegetables produced in the State of Idaho. In Miller v. Michigan State Apple Commission, 296 Mich. 248, 296 N.W. 245, the court interpreted a taxing statute relating to apples grown in the State of Michigan. In each of those cases it was held that the tax imposed is an excise or license tax, not a property tax; that it is levied solely upon the privilege of turning the products into the channels of commerce."

* * * * *

OPA - Processed Cherries

In the case of Bowles v. Fruit Growers Co-op., 61 F. Supp. 745, a suit was instituted for treble damages against the cooperative by the Administrator of the Office of Price Administration, who claimed that the cooperative had "sold cherries between July 31, 1943, and September 10, 1943, at prices in excess of the maximum prices established therefor by Maximum Price Regulation No. 306, as amended, and Order 51 issued thereunder." The court said:

> "The question to be decided is: Was the defendant subject in 1943 to Maximum Price Regulation 306 as amended? Stated differently, we must determine whether the sale by defendant of freshly picked cherries, washed, graded and pitted, and deposited in unsealed cans and barrels, and over which sugar had been poured in the ratio of one part to four parts cherries, constituted the sale of canned, preserved or processed fruit within the meaning of MPR 306 as modified by Amendment 11.

"The containers were not hermetically sealed. Hence the cherries were of course not canned. Nor is any contention made that they were preserved by the process described, but the administrator does insist that the cherries were processed within the meaning of the regulation. The washing, grading, and pitting of fresh cherries clearly is not processing. It is a question, however, whether the addition of sugar in the proportion heretofore stated brings them into that classification.

"Par. 1341.551(e) of MPR 306 provides: '"Processor" means the canner, manufacturer or packer, as the case may be, of any item covered by this regulation.' And subsection (h) provides: '"Packed" means processed and enclosed in any container, whether or not hermetically sealed.' Such definitions are not very helpful in solving our problem. Saying in effect that a processor is one who processes is not very enlightening.

"Under MPR 425 issued July 5, 1943, a price ceiling was set on sales of fresh fruits to any processor and specifically refers to 'cherries, red, sour, pitted.' Section 2(a) says: '"Processor" means a person who commercially processes the fresh fruit, berry or vegetable being priced. For example, one who cans or freezes the product being priced, or who uses it in making confectionery or bakery products, is a "processor."'

"MPR 426 states that maximum prices are set for certain fruit including red sour cherries 'by the addition of the cost of transportation (including refrigeration and other protective services) and a stipulated dollar-and-cent markup.'

"Plaintiff has failed to meet the burden of proof upon him to establish that the cherries sold by defendant in 1943 were processed. The evidence clearly establishes that the addition of the sugar was only a temporary expedient. One witness testified that the addition of sugar in a one to four ratio would keep the cherries from spoiling for two to three weeks providing they were kept at a low temperature. Another testified that the addition of sugar in that proportion would not prolong the life of the cherries. Assuming, and I find to be the fact, that the sugar temporarily arrests deterioration, it merely acts similar to refrigeration and does not change the cherries from the category of fresh fruit. In Corn Products Refining Co. v. Federal Trade Commission, 324 U.S._____, 65 S. Ct. 961, 970, the court referred to the term 'processing' which is undefined in the Robinson-Patman Act, 15 U.S.C.A. §13(e), and said: '* * * While the Act does not define the term "processing," the conversion of dextrose into candy would seem to conform to the current understanding that processing is a mode of treatment of materials to be transformed or reduced to a different state or thing. * * *' In the case at bar the cherries were not transformed or reduced to a different state or thing. They remained perishable fresh fruit."

In reaching the conclusion that the cooperative had not sold processed cherries, the court appears to have relied on the fact that the OPA Administrator issued an order to district directors of the OPA on the subject of marketing of cherries -

> "instructing them to cease granting sugar to cherry growers who were shipping fresh picked cherries over which sugar had been poured in the ratio of four to one or five to one. The order reads: 'Sugar so used does nothing to preserve the cherries.' The cherries in question were not rendered immune to decay and spoilage by the addition of the sugar. Sugar was added so as to enable the defendant to reach fresh fruit markets not more than nine or ten hours hauling distance and having the cherries delivered in an unspoiled condition. If the cherries had been canned or frozen or dehydrated so that spoilage would not occur for an indefinite period, they could properly be regarded as processed, but the cherries in question were not processed and the motion of the defendant for judgment will be granted."

The court appears also to have given some weight to a letter written by the Chief Counsel of the Green Bay office of OPA to the defendant in which he said:

> "Cherries become processed food only when they are packed in hermetically sealed containers and sterilized by the use of heat, or when they are frozen."